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THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS. II.

IN a previous article,¹ taking up the pledge-idea in Germanic and Scandinavian law, we first noticed its development from the forfeit-idea to that of collateral security; and then proceeded to examine the relation of three subsidiary types, — the hypothec (or pledge without creditor's possession), the sale-for-repurchase, and the vifgage. The second of these we now take up.

III. Sale for Repurchase.

Since the *wed*, in its original form, was the transfer with a right, but no duty, on the transferor's part, to redeem, it might seem a not inaccurate description to call it a sale with right to repurchase (*Verkauf auf Wiederkauf, vente à réméré*). At any rate, a transaction called by these names is constantly found where a pledge would apparently have served the same purpose; and its relation to the *wed* is one of the problems to be solved. The chief questions are: 1. How far, in form and in legal effect, was there a difference? 2. How far originally were the motives, or circumstances of use, the same or different? 3. What ultimate trace, if any, has been left on the pledge-transaction by the other?

1. *a.* So far as the form of the transactions was concerned, they appear to have been, to a great extent at least, interchangeable, and to have been used, at least frequently, without discrimination,

¹ 10 HARVARD LAW REVIEW, 321.

and with more or less mingling of terms. In a contemporary's words: —

"Is tamen usus loquendi est laicorum, qui inter nomen venditionis, ubi immobilia cum pacto retrovendendi vendentur et inter nomen pignorationis, non faciunt differentiam."¹

The summing up of Heusler seems incontrovertible: "The *satzung* is in its essential nature a conditional sale; . . . they are merely differing modalities, such as are often found in the law, without thereby marking any difference of institution."²

b. But this identity of essence, in that both transactions leave the transferor with a right, but no duty, to redeem, was not inconsistent with minor differences of legal effect, which might furnish a motive for choice between them. Were there such differences?

(1) Term of redemption. There was apparently no difference here. The *wed* with no fixed term might be redeemed indefinitely in the future, as we have already seen, except where a custom or law had come in time to establish a limit; and the same appears to be true of the right to repurchase.³ Apparently, however, the

¹ Zasius, writing in 1590, quoted Meibom, 7.

So also the constant use and modern perpetuation in pledge-terms of *redimo, redemptio*, shows how, even in the payment which released a pledge, the idea of "buying back" was originally a natural one (Meibom, 265; Heusler, II, 138). Again, the phrases of pledge and sale are frequently found coupled in a way that indicates the absence of any necessity for or habit of discrimination; thus, "*weddeschatte verkopen*," and "*wedderkope verpanden*" occur (Meibom, 266); a castle is sold for repurchase, and the document continues, "*und sie wollen uns das Schloss, und was ihnen damit versetzt ist, wieder zu kaufen geben*," etc. (Heusler, II, 138); so in Latin, "*Hec cartula vendicionis pignus est posita*" (Kohler, 357). So, too, in phrases purporting to enumerate the possible ways of creating pledge-incumbrances: "*Alle die gute die von uns verchumbert, versetzt, oder auf einen widerchauf verchauft, sint*"; "*quae inventa fuerint impignorata vel sub spe redemptionis vendita*" (Meibom, 360). There was the same interchangeability in Scandinavian custom (Amira, I, 218 ff.; II, §§ 22, 69). In Iceland the development of the sale-form was marked. There were two varieties, with reference to time of redemption, — *seljá til stefun*, sale till term, and *seljá til mála*, sale till resale, i. e. for an indefinite period. There was also a peculiar form in some laws, known as *forsolumala*, which the buyer had also the right to compel the seller to buy back, i. e. to treat the original advance as a debt; this was equivalent to the later form of the pledge, and was used in its stead.

² II, 137. This quality completes the demonstration, if anything is needed, that the primitive nature of the *wed* is that of a provisional discharge of the claim, leaving the debtor with no duty to pay or redeem.

³ Amira, II, § 69. In Scandinavia this perpetual redeemability was cut down by successive steps; 15 and 20 years were the periods prescribed by some laws, and sometimes the limit could be kept open by a public notification of the claim. A distinction also existed in favor of *stammgut*, or inherited land, which has an important bearing later. In Germany the authorities accessible do not mention the existence of such limits; but they can hardly be doubted.

indefinite term in the latter was in practice more frequent, — a circumstance whose bearing will be seen later.

(2) Validity of third persons' rights. A *res* in the transferee's hands was equally safe, as regards the transferor, whether given in *wed* or by sale for repurchase. There was no *auflassung* in either (see *infra*); and hence the seller's right, in the sale for repurchase, was not a mere personal one against the buyer, but involved a property right to redeem in the hands of a transferee from the buyer.¹ The later use of the *auflassung*, however, would seem to have destroyed this right in both alike.

(3) Accessory nature of the *wed*. As the accessory or collateral-security function of the *wed* developed, there would of course be a difference between that and a sale for repurchase, in that along with the former a debt would independently coexist. But this could not affect the choice for the creditor, for he then would and did simply take a separate instrument of debt along with the sale-document, so that if he chose he could pursue the debtor on that claim without availing himself of the *res*.

(4) Necessity of *auflassung* or *resignatio*. If the sale for repurchase involved an *auflassung*, this would furnish a decided motive for the creditor's choice. But it seems clear that originally the *auflassung* was wanting in the sale for repurchase, just as it was in the *wed*; the theory of the transaction, as well as the actual forms of the documents, show this.² Later, when the *auflassung* was resorted to in the *wed* in order to give the creditor absolute title without going into court, and thus to evade the duty of restoring the surplus (as already explained,) the same practice appears in the sale for repurchase.³ Just here came an opening for a

¹ Heusler, II, 139. Meibom, 359, is *contra*; but does not take notice of the lack of *auflassung*. The modern law, till the new Code, took a middle position: Motive zum bürgerl. Gesetzb., III, 451. Heusler seems to believe that the pledgee's sale to a third person would be wholly unlawful, without express permission, but that in the sale for repurchase the right to sell was usually given, subject to the original seller's right to buy back from the third person; so that the latter afforded a better expedient where the pledgee wished the means of speedy realization by resale (II, 140). But this seems reducible to a question of whether the permission to resell was given more frequently in the latter than in the former, and there seems to be no evidence that it was.

² Heusler, II, 138.

³ Ib. 139. Neumann, 191, has a typical form, from Cod. Dipl. Siles., IV, 298: "A. . . a J. et J. filiis N. . . ix. virgas agri . . . comparavit [bought] . . . , quas ad manus A. resignaverunt; graciose est adjectum quod si infra viii. annos restituere poterint quantitatem pecuniæ pretaxatam, . . . A. arbitrio et favore vendendi predictis fratribus stare debbit."

decided choice between the two forms; for, as we have seen, the later mediæval and early modern law set itself to nullify this evasion of the pledgee's duty by requiring him to come to court for forcible sale of the pledge, and to sell and to hand over the surplus, in spite of such a forfeiture-clause; and by calling the transaction a sale he might escape this supervision. This choice, however, was essentially a result of the later law, and will be noticed again; it throws no light on the original reasons for choice.

(5) Evasion of the interest-prohibition. As this prohibition did not obtain much strength until, say, the 1200's,¹ it is obvious that it could not have affected the original choice. Moreover, as it was only slightly in vogue in Germanic regions,² and practically not at all in Scandinavia,³ while thoroughly accepted in France, and as the sale for repurchase attained its highest development in Iceland and was least common in France, the choice of the sale for repurchase had clearly in its essence nothing to do with the canonical interest-prohibition. Finally, that prohibition in terms brought also, where it was actually enforced, the evasive sale for repurchase under its ban; so that there was little reason to prefer it as a method of evasion.

There were, then, apparently, no *legal* effects of the one or the other form, in the beginning, which could motivate any choice for either, by debtor or by creditor. Were there, then, any other circumstances to explain that choice?

2. The descriptive phrase in a passage above quoted, "*sub spe redemptionis vendita*," will perhaps best introduce us to the theory that will be here suggested. We are dealing primitively, it must be remembered, with a community in which the sale, and much more the pledge, of the family estate is all against the grain.⁴ It is a community in which the land is often held and cul-

¹ 1877, Darif, *Le Pret à Intérêt*, 129, 140 (placing the date at 1200+); 1891, Goldschmidt, *Handelsrechts*, I, 140: "Unfounded in many respects is the oft-repeated assertion that modern commercial law only very gradually threw off the fetters of the canonical principle; . . . not once was the Church able to enforce practically its prohibition of interest; . . . in the secular courts the prohibition did not come to be applied until the middle of the 14th century." Thus the opinion of Endemann (II, 339) and Neumann (186 ff.), that the interest-prohibition was the source of the resort to the sale for repurchase, seems inapplicable to earlier times.

² Neumann, 72, 183-194; Stobbe, *Priv.* 270; Endemann, II, 341.

³ Amira, I, 201, 661; II, 800.

⁴ See the exposition by Fustel de Coulanges of the religious and moral repugnance primitively prevailing against the transfer of land-property: 1891, *Nouvelles Recherches*, 78.

tivated in entirety by the family members;¹ in which the consent of all the heirs (even where genuine entirety does not exist) is requisite for a sale down to the latter Middle Ages; in which these heirs, till a still later period, have at least a right to buy back; and in which the alienation of land on execution to pay debts is the last step taken in that type of process. It is, moreover, a community in which bankruptcy brings a social stigma of a quality impossible for us to appreciate; in which it ruins the family, and makes "broken" men of its members. The stress which forces to pledge the family estate and to resort to the money lender is the last stage short of bankruptcy;² and it is a stage which the family does not wish publicly to acknowledge that it has reached. The transaction, then, which will raise the needed money, will leave the way open for a winning back of the family inheritance when its fortunes have been regained, and will at the same time avoid the stigma of being forced by a pecuniary need, is the transaction which will commend itself as the desirable one, wherever it is by means of the family inheritance that the money is to be raised. Such a transaction is the sale for repurchase. Moreover, two circumstances combine to favor it. In the first place, the aid will be sought by the debtor, if possible, from some more prosperous branch of the same family, because that will seem to the world a more natural transaction, because the buyer will take less advantage of the family need, and because, since they have only a *spes redemptionis*, the term within which repurchase can be made must be as long as possible. In the next place, such a person will be more likely to be willing to buy on terms of indefinite repurchase, because he will advance the money less from the desire to forfeit the land ultimately than from a wish to help his relatives over a time of distress. Where such a situation exists, then — the family inheritance the only means of raising the money, and a relative or friend indifferent as to the term of repurchase, — the sale for repurchase will always be chosen.

Three circumstances tend to show that this was in fact the motive for choice. First, the highest development of that form of transaction was reached in the communities — viz. West Scandinavia — where the mobility of land-capital was least, and where

¹ Heusler, I, § 50.

² "Nu kummet eyn man deme erbe [land] ist anisturben, unde spricht her, 'sy benotiget, und meynet, erbe tzu verkummern'" (Kulm. R. Lib. IV, § 88, quoted by Weisl, 44).

the primitive integrity of the family estate was maintained longest and strongest; and it was smallest in the communities — viz. France — where the opposite conditions prevailed. Secondly, occasional passages show that this was in truth the motive for such transactions.¹ Thirdly, the process of the compulsory cutting-off of the transferor's outstanding right of redemption in case of an indefinite term, which we find fully recognized in the earliest Scandinavian records, was much later in being reached for the ordinary sale for repurchase, and in the Middle Ages is not reached at all for the *stammgut* or family-inheritance, which could be redeemed indefinitely at an era when a limit of twenty years was legally fixed for the repurchase of other lands,² — indicating that the sale for repurchase must have been the peculiar and legally favored resort of distressed families at a time when their redemption-right for an ordinary pledge could have been cut off in a limited time.

Such, then, seems the probable early motive for a choice, in certain conditions, of the sale for repurchase as against the pledge.

3. In later times, this motive would probably grow less. But by the later Middle Ages a new reason of preference, for the creditor at least, had sprung up. When the main mark of the collateral-security idea in a pledge — the restoration of the surplus — had become sanctioned by custom, and when the creditor, after finding that an *auflassung*-clause in advance would enable him to evade coming into court and restoring the surplus, was after all being compelled to come into court and perform this duty, in spite of the *auflassung*-clause (or *lex commissoria*) — say, in the 1400's and early 1500's, — he now found, or thought that he had found, an ark of refuge in the sale-for-repurchase form of transaction. This was not on its face a pledge, i. e. there was no principal debt to form a standard of liability and to determine whether anything or how much should be returned as a surplus, and hence there was no reason to say that the value retained by him on default of redemp-

¹ For example, in the Gotlandslage (Amira, I, 209) we read: "*When necessity begins to compel to alienate the land for the maintenance of the family before all the children are of age, there shall be transferred (festa) the share of each, but not by perpetual sale (fastu selia).*" In mediæval Japanese deeds a common phrase at the opening is: "This land has been owned by my ancestors for many generations; but now, owing to pressing need, it is transferred to the present purchaser for a price" (Wigmore's Notes to Dr. Simmons' Land Tenure, etc., Trans. Asiat. Soc. Jap., XVIII, 163). It is, indeed, by an observation of the clear facts of feudal society in that community that the writer has come to believe that a similar explanation is to be found for the *kauf auf widerkauf* in the Germanic Middle Ages.

² Amira, II, § 69.

tion should be scaled down; that is to say, *if* the transaction had been in reality a sale and not the covering of a debt. The process of defeating the creditor in his new attempt, by altering the form of the transaction, to evade the law of pledge became, as we know, a notable feature of English mortgage law. The German law solved the problem in its own way;¹ but it is enough to note here the part which the *kauf auf wiederkauf* played, in its relation to the pledge, in the later mediæval law, and the form in which history presented the problem to modern law.

One thing only remains to notice. The *kauf auf wiederkauf* is the natural and chief type of the sale form as distinguished from the pledge form. But there is a subsidiary form, which, as Brunner has pointed out,² must be distinguished, — the sale on condition subsequent. This form was particularly popular in Lombardy,³ and also in England. In one variety, it merely requires the return of the *carta*, or deed, on payment of the sum.⁴ In another, it provides that the deed shall be null, and, sometimes and incidentally, returned.⁵ The legal difference seems to be simply that in the *kauf auf wiederkauf* the revesting of title on redemption requires a new and distinct transfer, while in the other form the act of payment *ipso facto* revests the title. Brunner has sug-

¹ Whether a transaction is to be treated as a genuine sale for repurchase or a giving of collateral security only is to depend, according to the *Motive* of the new Code (II, 340), on the circumstances of each case. In the *Gewerbe-Ordnung*, regulating the trade of pawnbroking, it is provided (§§ 34, 38) that "the professional purchase of personalty with reservation of the right to repurchase shall be treated as a business of pawnbroking."

² Rechtsg. Urk. 194.

³ Kohler, 40, 94; Heusler, II, 136.

⁴ "Fecit Natigerius . . . cartulam vendicionis in manu Dadolo . . . ; si predicto Natigerius vel suos heredes fecit sanacionem de suprascripti denarii . . . , *reddere debet* Dadolo vel suos heredes *ista cartula rasa sub pena dupli*"; then a hybrid clause not invariably present: "et si . . . non fecit sanacionem . . . , deinde in antea *ista cartula vendicionis firma et stabile permaneat sub pena dupli*" (Kohler, 357).

⁵ "Promitte . . . quod si P. . . sanacionem [debiti] fecerit, *reddatis si cartam illam vendicionis quam in vobis amisit de petia una de terra, capsatam et taliatam ut in se nullum obtineat robur*"; again, "[After a sale clause], *Ista carta facta est eo tenore: si ego . . . vobis . . . parati fuerimus ad dandum . . . de argento [amount and date] . . . , quod sit [carta] inanis*" (Val de Lièvre, 29, 33; in the Italian practice, this passage commonly formed a separate document from "*ista carta*" of sale); "*Ista vendicionis carta, nomine pignoris, tali tenore facta est quod qualicumque die ab hodie usque ad duos proximos annos A. reddiderit fratribus solidos mille, tunc ista venditio et carta resolvatur, reddatur, et nihil valeat*" (Heusler, II, 136). There were other varieties also, some of which more or less distinctly referred to the transaction as "pignus."

gested¹ that the reason why the latter became popular in England was that the ordinary pledgee did not have the possessory action; but this does not explain the choice between the two varieties of the sale-form; and more satisfactory reasons might be found, which it would be out of place to discuss here. It is enough to note that this variety of sale-form, which later appealed to the creditor as a means to evade the pledge law, was early popular in Lombardy.

IV. *Tod-satzung*; or, *reckoning Profits against Capital*.

1. When the primitive notion of *wed*-payment prevailed, and was natural, no one thought of asking what became of the profits of the thing handed over. The *gewere*, or possession, of the pledgee gave them to him, just as the pledgor would have taken them by the same token. There is thus no question of "reckoning" the profits, or any part of them, against the capital, any more than there is of restoring a surplus; the pledgee simply takes the *wed* as a provisional substitute for what he would otherwise have had absolutely. But several circumstances later combine to raise the question. First, the notion comes forward of the debt as independently subsisting as a standard of the creditor's right. Secondly, pecuniary capital comes to be accumulated and used professionally and systematically, and its gains come to be thought of as measurable; so that what a debtor can borrow money for is capable of fairly accurate estimation. Thirdly, with the increase of infeudation, the multiplication of subtenancy and rent charges, and the systematization of taxation, land-values—in terms of rentals and the like—come to be more definite and fixed. All these combine to make the debtor understand the gain that a pledgee can secure merely by collecting the profits of land pledged, and to make him feel that he can afford to demand terms of the creditor as to the limit of this profit. In a given case, then, he may now demand that the profits received above a certain amount shall go to his benefit,—i. e. shall be used to reduce the capital sum for which the land is a substitute. It is in this stage that we find, say, the middle mediæval law, i. e. there shall be a reckoning of profits against the claim only so far as is expressly agreed.² In other words, *tod-satzung* is not a primitive form of *satzung*.

¹ Pol. Sci. Quart., 1896, XI, 541: "It [the ordinary pledge of realty] became impracticable in England and had no future there, because the gagee did not have the possessory action."

² Amira, I, 201; II, § 22; Heusler, I, 143; Meibom, 375, 399.

In the next stage the presumption has changed, and the imputation of some surplus of profits on the claim is deemed to be so generally understood that it is now for the pledgee to secure himself by stipulating that it shall not be made.¹ Finally comes the stage of modern law, when the pledgee is compelled invariably to submit to such a reduction.

The terms were various, most of them involving the notion either of "striking off" something from or "reckoning" something upon the principal claim, — "totslak," "abslahung," "absleg," "abslag," "afslach," "rekenynge," "rechenschaft," and in French and Latin sources, "acquittatio," "acquit," "computatione in sortem."² The method of computation was often by the valuation of experts,³ often by a court.⁴ It might take place without special prearrangement⁵ or at fixed times.⁶ Where the amount of the *abschlag* was not left to crop contingencies, but was fixed beforehand, the periods were of course thus supplied, and there was no resort to third parties for valuation.

2 a. The profits might of course be reckoned off by various schemes. (1) First, and presumably earliest, was the scheme most favorable to the pledgee; he was to take out first a fixed amount (whether called "interest" or not), and only the contingent surplus was to be reckoned against the principal sum.⁷ (2) Secondly,

¹ A special clause might be used: "nec computare . . . nobis tenebitur," or a phrase might suffice: "ane," "one," "on," "sonder," "sine," (all meaning "without,") followed by one of the words mentioned in the text: Kohler, 133, 108. Another form, having exactly the same purpose, but more usual in the south, was: "et quicquid fructus quos inde tollere potuerimus, de super et de subtus, inclitum illud novis aveamus faciendi ex eo quicquid voluerimus"; "quid de fructum exierit, quicquid facere voluerimus" (Kohler, 87, 88, 89, 91).

² Kohler, 258, 133, 309. *Todsate* was the phrase for the species of *satzung*. The French phrase *vifgage* will be later explained.

³ "Sub testimonio bonorum virorum" (Kohler, 105).

⁴ "Als oft auch ein tots lak in dem obgenanten gericht geschee" (Kohler, 258).

⁵ "Allodium meum . . . pro pignore exposui . . . quousque prefata ecclesia dictas XXXII libras plene et integraliter sub testimonio bonorum virorum receperit" (Kohler, 105).

⁶ "Dat sullet se alle yar myt uns rekennen als dat korn gemeynliken gyldet up deme markede to derne Berge eynis Sunabindes vor und eynes Sunabindes na sente mychahelis dage" (Kohler, 108).

⁷ A house is pledged for 10 marks; the pledgee "de conductione domus unam marcam tollat pro censu, et residuum deputabit de decem marcas quousque suas decem marcas deputabit" (Kohler, 106); pledge of land for a debt of 600 marks, "until they [pledgees] from the above mentioned use and fruits, over and above the 60 marks which they shall each year receive from the said, etc. . . . have paid themselves the said 600 marks," etc. (Kohler, 132); pledge of a village for a debt of 1500 gulden at the

and presumably later, or when the debtor can make better terms, it is the pledgee whose profits depend on a contingency, the principal sum being cut down by a fixed yearly or monthly amount from the fruits.¹ (3) Still a third way was for both parties to risk the contingencies, dividing the gains equally.²

b. Was there any way in which the *abschlagung* varied the nature of the pledge, so that the *res* itself ceased to be thought of as the equivalent of the *sors* (or principal sum), and the use or profits, i. e. the usufruct, was regarded as the real subject of the pledge? If there was, we may be in presence of a new and wholly distinct species of pledge, as Franken maintains.

There were two arrangements which on their face might be open to that construction. (1) The application of the *entire* profits of the *res* to diminishing the principal sum.³ Here no interest is mentioned; and it might seem that the profits or the use was treated as equivalent to the capital when spread out in instalments without interest. But, by the simple expedient of increasing nominally the principal sum, the pledgee could, and undoubtedly did, protect himself, and the transaction did not differ from that with the ordinary *abschlag* of the surplus.⁴ (2) The assignment of a

interest rate ("zu rechter gulte") of 1 for 15; the pledgee to take the profits "nacht antzale der obgeschriben gulte von funfftzeh guldein einen guldein," and "was aber uber dieselben gulte daselbst gefellet" the pledgee is to "ungehindert werden und volgen lassen uns" (Id. 335).

¹ The pledgee is authorized "predictum pignus ingredi et habere godimentum pro lucro [naming amount] denariorum, et habere de omni libra omni mense denarios sex donec debitum sit solum" (Kohler, 108); pledge of a house, "quod [naming pledgee] singulis annis ad diminutionem debiti unam marcam argenti, quousque dictam donum redimamus, in sortem computabit" (Id. 111); pledge of a serf for a 6-mark claim, 1 mark to be counted off yearly (Id. 259). But we are not to assume, perhaps, that the pledgee was here less favored; for obviously the *res* pledged might be so large that the fixed *abschlag* left a relatively high interest to the pledgee.

² "Als oft auch ein *totslak* in dem obgenanten gericht geschee, was davon zu busse und besserung mak gevallen, dieselbe besserung schol uns und unsern erbe *halbe*, und das *ander halbtteil dem* [pledgee] und seinen erben ongeverde volgen und gevallen" (Kohler, 258).

³ For example: "Nec ego [pledgor] nec aliquis heredum nos intronemur nisi [naming pledgee] primitus et ante omnia receperit et requisierit de ipsis bonis et eorum redditibus debitum quinque marcarum" (Kohler, 130); "ut omnis introitus . . . percipiat usque ad solutionem vestri prestiti" (Id. 131).

⁴ Thus (Kohler, 308), a certain Rudolph, in 1315, recites in favor of the pledgee a debt of 150 pounds by deed, a debt of 50 pounds for loss suffered in rendering help in a war, and another of 50 pounds "for the service which he shall now do us," making in all 250 pounds; and for this he pledges "unser gerihte ze Hembau" providing that the income "von dem stab und von dem chorngült" shall be "niht abslahen," but the income "von den stiuren und von zinsen" shall be "alles abslahen," and the pledge

fixed rent to pay the principal sum. Here, also, as just suggested, the fictitious increase of the principal might enable the pledgee to secure in reality both principal and interest. But, apart from this, the purpose of the pledging of a rent was not regularly, perhaps not even usually, to pay the principal sum; it was constantly used, on the contrary, merely to supply the interest, while leaving the principal sum standing for later redemption by a payment independent of the rent.¹ That is, the equivalency was between the rent and the interest, not the rent and the principal sum regarded as payable by instalments.

In the cases, then, where the entire profit or a rent charge is to be applied to the principal without mention of interest, there is not necessarily a new variety of pledge; the notion of *abschlag* is merely employed to evade the prohibition of interest (where that prevailed), and the transaction may be in fact essentially the same.

3. In the mere methods of *abschlag*, then, or in the fact of its use, there is nothing essentially different in the theory of the pledge. It is the *res* that represents the principal sum, as ever. The view of Franken,² that the *satzung* with pledgee's use and an *abschlag* is essentially a mere transfer of use or usufruct, is therefore not a necessary consequence of the *abschlag* feature in itself. But there are further indications, of a positive and not merely a negative bearing, that the provision for *abschlag* is merely an incidental feature in the growth of the ordinary *wed* pledge.

(1) In the first place, we find the *abschlag* treated in the documents on the same footing as other provisos, such as the pledgee's duty to restore surplus, or his claim for deficit.³ That is, at certain stages of the development (as already explained) towards the pure

shall continue till the whole sum is paid. Here, obviously, the last 50 pounds might be purely fictitious, so that the "alles abslahen," even of the entire income, might be made to pay the real debt and a good interest also.

¹ "Decimam vinearum [naming pledgor] in vadimonium posuit pro XV^{im} solidis [naming pledgee], tali facto ut quando [pledgor] XV^{im} solidos reddere vellet, decimam libere recuperaret" (Kohler, 95, also 105). The nature of the transaction is clearly brought out by such agreements as these: For 50 marks capital, a rent of 5 marks is granted, and "as soon as we the pledgor pay 25 marks, the rent to the extent of 2 pounds is released to us" (Kohler, 243, also 107).

² His book deals with French law, but he seems evidently of the opinion (142, 186, and elsewhere) that his conclusions are also valid for the pure Germanic law.

³ Thus: "*ungerechent*, ind up yre kost, *wynnonge*, ind *verluyt*" (Kohler, 133); "*nec computare nec respondere nobis tenebitur*" (Id.); a provision for non-accounting for profits, followed by a provision for restoring on default the surplus value of the *res* (Id. 88).

idea of collateral security, these matters had to be expressly provided for, and, along with these, the notion of "reckoning" surplus fruits on the capital, which was equally a step towards the collateral security idea, was treated in a perfectly natural way as one of the germane matters to be settled beforehand. So also a forfeiture-clause (the mark of the forfeit-idea) will be found side by side with a clause dealing with the *abschlag*.¹

(2) Just as the forfeit-idea was got away from by agreements that the pledgee should not keep a surplus, and the pledgor should pay the deficit, the one being in a sense the complement of the other, so the *abschlag*-agreement, which did away with the excessive profits otherwise to be made by the pledgee, had its complement in the shape of an agreement by the pledgor to make up any deficiency of the fruits below a certain rate.² In other words, the notion that there should be a limit of interest-profits, beyond which the pledgee could not keep them with fairness, could not be reached without reaching also the notion that a deficiency below that rate should be made up to him by the pledgor.

(3) Except for the case of rent (above explained), the pledge is of the *res*, not the fruits; and in all the minor and indescribable features of phrase the pervading spirit of the documents is that of the ordinary *wed*.

Looking at the *satzung* with *abschlag*, or *todsatzung*, then, in the light of the general notion of *wed* or *satzung*, it seems to be nothing more than the ordinary *satzung* with a feature representing the progress towards the idea of collateral security, i. e. with a limitation upon the pledgee's rights, based on the notion that the principal debt and its interest form the standard of claim, for the sake of which the *res* is to him merely a collateral security, and beyond which he should keep nothing. The duty of the pledgee to return the surplus of the *res*-value above the principal sum is of

¹ "Impignoravimus tibi . . . , et facies de ista vinea quid de fructum exierit quicquid facere valueris, usque in tercio anno, et si a tercio anno non potest adimplere ipsum precium in ipsa convencionem, ipsa vinea permaneat . . ." (Kohler, 91, also 87).

² Thus: "Impignoro vobis curtilem unum [describing it] pro solidis XV, eo tenore ut tandiu predictae ecclesie monachi ipsum curtilem teneant, donec ipsum debitum persolutum est; ita tamen ut singulis annis tres modios et dimidium de vino eis reddatur [i. e. as interest-fruits], et si in ipsa vinea tantum non habuerit, ex meo alio tantum persolvam" (Kohler, 91); "impignoramus vobis . . . ut tamdiu teneatis vos hanc terram quamdiu reddamus vobis hoc pretium; et ipso anno quo hec terra non reddiderit fructum, nos persolvamus vobis unum modium vini" (Id. 92); a pledge for 700 marks, with 70 marks annually as a first charge on the fruits for interest, and other charges up to 250 marks; if more is yielded, a reckoning upon the capital; if less, the pledgor will make it up (Id. 106, also 116).

a piece with his duty to return the surplus of the profits above the interest-rate, and the stages of development are similar and almost parallel. Wherever legislation has allowed the pledge without *abschlag* to survive, it is only on the theory that the pledgee will also have the risk of a deficiency or total lack of fruits, and hence should have the chance of profit along with the risk of loss.

Wherever, too, we find historically a reckoning of all the profits upon the capital, without allowance for interest, we are to suppose that it is merely an attempt to evade the canonical prohibition against taking interest, and not that it is a separate type of pledge. To suppose that, as a customary thing, and apart from casual cases of friendship, loans will be made with no charge at all for interest, and that there could be a type of pledge based on that theory, is to suppose moral impossibilities. In short, but for the interest-prohibition, and the effort to evade it, there would have been practically no resort to that particular and extreme form of the *abschlag*-transaction.¹

2. JEWISH LAW.²

I. From the point of view of etymology, the translators give us no material assistance. We do find, however, in unmistakable clearness, the chief marks of the forfeit-idea.

1. No claim by the pledge for deficit where the *res* has perished

¹ A conclusion corroborated by the fact that this form of "reckoning" (i. e. "*toutes les despuelles* [profits] . . . *sunt rabatues de la dette*"), constantly insisted on in France (Franken, § 8), where the usury-ban was in force, never came to be the law in Germany or Scandinavia, where the usury-ban had little or no force (Neumann, 72, 183-194; Stobbe, Priv. 270; Endemann, II, 339; Amira, I, 201, 661; II, 800).

² In the Jewish law there is often a special opportunity to note the different stages of a doctrine, because the law itself is preserved in three distinct stages, viz. the Pentateuch, the Mishna (a kind of codified customary of not later than 300 A. D.), and the Ghemara (a body of commentaries on the Mishna, the commentaries of the Jerusalem school being collected about 400 A. D., and of the Babylon school about 500 A. D.). The opinions of the early rabbis formed the Mishna; and this again was developed by constant discussion into the body of commentaries called the Ghemara, which purports simply to record the results of one or two centuries of discussion. Moreover, the Jewish law shares with the Roman, the English, and the Japanese the feature of having been developed largely through the discussion of cases and principles and the citation of precedents, — an indication of what may be called the juristic instinct. References: 1866, Mayer, *Die Rechte der Israeliten, Athener, und Römer*; 1893, Bloch, *Der Vertrag nach Mosaisch-Talmudischer Recht*; 1888, Schwab, *Talmud de Jérusalem*; 1860, Rabbinowicz, *Législation Civile du Thalmud*. The last two are translations of the Talmud, and are the only satisfactory sources. The citations of the Talmud will here be given from Rabbinowicz, by volume and page, with the additional citation of the folio of the original books (Baba Metzia, etc.) as marked in Rabbinowicz.

by accident or has deteriorated. According to the Mishna, the pledgee was as bailee responsible for all loss (including theft or destruction) short of the act of God or an enemy, or other inevitable loss, i. e. a stage somewhat beyond that of the primitive Germanic law.¹ Here as there, the inability of the pledgee to recover his debt after a loss of the pledge might perhaps be attributable to his liability as bailee, but for two circumstances; viz., that the pledgee loses his whole claim (and not merely the value of the *res*), and that the equivalency of the *res* and the claim are expressly predicated.²

2. No duty of the pledgee to restore the surplus. This also is perfectly clear as the starting-point of the Jewish law; but as most of the passages deal with it in connection with the hypothec and the *auflassung*-clause, we may postpone it for a moment.

3. The *auflassung*-clause or forfeiture-clause (*lex commissoria*) was evidently resorted to in the same way as in Germanic law.

¹ R., III, xxxiv, 23, 357, 377 (Baba Metzia, 5, 80 ff., 93). There were three degrees of responsibility: (1) bailee without pay (*schomer hinam*); (2) bailee for pay (*schomer sakhar*, with whom usually ranked the *sokher* or hirer); (3) gratuitous borrower (*schoel*). The first was responsible only for loss by fault; the second, for loss as above limited; the third, for all loss.

² At the time of the Ghemara, Rabbi Eliezer advanced the proposition (Baba Metzia, 357) that the pledgee should be put in the first class, i. e. on proving himself not in fault, he "might demand payment of the debt." But on the opposite side, R. Akiba claimed (R., III, 366): "The debtor may say, 'Your loan was merely on this pledge; if the pledge is lost, your money is lost'"; i. e. R. Akiba was for standing by the older Mishna rule. But R. Eliezer was willing to concede that, "if that pledge was given after the loan was made," then "if the pledge was lost, the money was lost," for there the equivalency would be perhaps clearer. Still another distinction was tried; R. Samuel had illustrated the Mishna rule by saying: "If a person lends to another 1,000 *zouzes* on a *res*, and the *res* is lost, the claim is lost, *in spite of the excess of value* [of the claim]"; and the later rabbis now attempt to refine away the Mishna rule by suggesting that it applies only where the *res* is more valuable than the claim, and not where the loss of the *res* still leaves, if set off, a deficit in the claim; i. e. they were advancing the notion which we have already seen carried out in the later Germanic law.

There is one passage looking the other way (R., III, 161, Baba Metzia, 34), in which it is disputed whether the pledgee, by taking an oath that the loss is not his fault, may recover the deficit from the debtor; this is easily explained as representing a later stage of discussion, when R. Eliezer's view had prevailed.

An illustration of the primitive principle is found in the discussion and affirmative settlement (R., III, 231, Baba Metzia, 48) of the proposition that a debt larger than the *res* in value is extinguished in the *schmitah* or seventh year (according to Deut. xv, 1-6: "At the end of every seven years . . . every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it, etc."); the very question is evidently a product of a new collateral-security idea; for if originally the debt had been treated as surviving the pledge-transaction, it would as of course be extinguished in the *schmitah*; the question's discussion in the Talmud times shows that the idea of the debt as independent of the pledge was then novel, and hence the applicability of the *schmitah* rule had just occurred to the minds of the *rabbis*.

The primitive notion of the pledge apparently allowed the pledgor, as in Germanic law, to redeem without limit of time.¹ But pledgees resorted to a form which seems to have exactly the same significance as the *auflassung*-clause, and this was, in the Mishna era, lawful :—

“If a man lends money to another on his field, and says to him, ‘If you do not pay me the debt three years from now, the field shall belong to me,’ in this case the field belongs to the creditor, if the debtor does not pay. This was the ruling of Baithous, son of Zonin, with the assent of all the doctors of the law.”²

By the time of the Ghemara, a later stage of opinion had been reached, and the view that the pledgee should be compelled to restore the surplus, or — what was almost the same — allow the pledgor to redeem in spite of the forfeiture-clause, was being advanced and had almost prevailed.³ We see here ample evidence that originally the *res* went in whole to the pledgee as an equivalent or forfeit, without regard to the surplus; that when the duty to restore the surplus was recognized, the pledgee’s method of evasion was to employ a forfeiture-clause; and that finally the duty to restore emerges again successfully in opposition to this clause.

II. The hypothec, or pledge without pledgee’s possession. The discussions of the rabbis show clearly enough that the hypothec was no different institution from the pledge, but was merely a postponed pledge, bearing all the peculiar marks of the forfeit-idea, and show the same stages of development.

¹ The custom of the district of Nehardea was to preserve the right of redemption forever, though a limitation to twelve months was claimed; the Ghemara decided (Rabbinowicz, III, 166, Baba Metzia, 35) that the custom was right, except that it should not apply to purchasers from the pledgee. We see here the process, found in Germanic law, of an originally unlimited redemption, cut down later in order to give the pledgee the power of disposal.

² R., III, 277 (Baba Metzia, 65). Another form, already seen in Germanic law, provided that the pledgee should, on default at maturity, be regarded as buying the *res* from the pledgor for the amount of the claim; but by the time of the Ghemara this also was disputed as improper (R., 279, Baba Metzia, 65).

³ Citations in preceding note. The Ghemara discuss this passage of the Mishna, and their opinions are divided. One distinction proposed was that the rule should not apply if the agreement was made after the loan given; but “Rab Nahaman said that, even though making it only then, the creditor could obtain the whole field.” Yet, “later, Rab Nahaman changed his opinion, and said that, even if he makes the agreement at the time of the loan, the creditor does not get the field.” The opinion of Nahaman was the weightiest of the time, and the great majority agreed with him.

The doctrine of *asmachta*, or usurious gain, as here applied to this transaction, is said by Mayer (§ 196) to have been first invoked by the Babylonian school in the 400’s; indicating the relative lateness of the resort to it, here as elsewhere.

1. The regular form of the hypothec was that of a postponed pledge: "If I do not pay the debt of [naming the sum] in one year, my field shall belong to you."¹

2. In the hypothec, as in the pledge (as we found in Germanic law), the marked incidents equally prevail of the pledgor's non-liability for a deficit, in case of destruction or deterioration, and the pledgee's non-responsibility for return of the surplus. In the stage of the Ghemara discussions, we find these primitive features being disputed and effaced, in the direction both of the pledgor's deficit-liability,² and of the pledgee's duty to forego the surplus-value.³

¹ R., III, 267, 277, 282 (Baba Metzia, 63, 65, 66); I, 370 (Khetouboth, 43). Moreover, the deodand rules show the same unity of idea. The deodand (or forfeiture of a harm-causing animal, etc., leaving the owner quit), as is well known, was as marked a feature of primitive Jewish law (Exodus, xxi, 28) as it was of Germanic, Greek, Roman, and others. The Jews divided such animals into two classes (R., II, 49, 54, 164, Baba Kama, 16, 18, 36); *tham* was the animal *mansuete naturæ* injuring for the first time; *monad* was the animal by nature dangerous; for a *tham*'s injury, the owner paid only one half the damage and with the body of the *tham* only; for the *monad*'s, the whole, and was personally liable for it. The former was called "paying by *migoupho*," i. e. by the body of the animal, i. e. as by *wed* or forfeit. Now the significant thing is that the injured person's claim in the former case is spoken of and treated as a hypothec; if the ox died or was killed, the injured person is without redress beyond the carcass-value, although he suffers a loss in the diminishing of "the value of his hypothec"; moreover, in the former case (of the *tham*), if the animal was sold, the claimant could seize it in the buyer's hands (as we shall see he could do for a hypothec); in the latter case, he could not follow it.

That the hypothec was peculiarly employed for contingent defaults may be assumed from the circumstances that it was used to secure the wife's *dos*, and that the ordinary pledge with re-lease to the pledgor (R., III, 290, Baba Metzia, 68) co-existed.

² "If a man binds his field by hypothec to his creditor, and this field is destroyed by a flood, Ami Schapirnaah said, in the name of Rabbi Johanan [i. e. as a disciple quoting or speaking for his master], that the creditor cannot pay himself from other goods of the debtor"; but Rab Nahaman would allow this result only where the debtor had expressly said, "I pay you out of this hypothec only"; [i. e. only in case of express agreement, — a later stage already noticed in the Germanic law]; Rabban Simon would allow it only for a wife's hypothec for her *dos* (R., I, 368, Gbitin, 41). But the first opinion is elsewhere sanctioned (R., I, 54, Betzah, 4).

The same primitive notion is betrayed in the rule (R., I, 183, Khetouboth, 56) that the *res* on which the husband gave a hypothec for the *dos* received could not be movables, for they might deteriorate in value; it must consist in immovables, unless the husband would guarantee the value of the movables. In other words, the risk of deterioration was on the hypothecary, in the absence of express agreement.

The custom of appraising the *dos* at the time of giving a hypothec for it (R., 192, Khetouboth, 66) is one found in other laws, and seems to be based on the notion that the *res* then set out as the equivalent of the *dos* is the absolute and sole resort of the hypothecary, at whose risk it deteriorates in value.

³ R., II, 383 (Baba Kama, 96); III, 64, 75, 310, 448 (Baba Metzia, 14, 15, 72, 110). The original notion evidently prevailing up to the time of the discussions here re-

3. The pledgee could follow the hypothec in the hands of a third person, whether buyer or second pledgee.¹

4. When a hypothec had been given, other creditors apparently could not seize it nor a second hypothec be given upon the same *res*.²

III. Sale for re-purchase. This form was apparently understood,³ and was apparently available for evading the pledgee's duty to restore the surplus; but we are without any evidence as to its history, nor are there any documents to reveal the exact difference of terms and form between this and the real pledge.

IV. Reckoning of profits (*Vifgage*). The Jewish rules on this subject do not clearly appear; but as we know that, until the rabbis' disapproval of the keeping of profits on industrial and commercial transactions, the pledgee must have kept all the fruits, and as such profit (*abakaribith*) is in the Talmud still not absolutely prohibited except by the opinions of some, we are entitled to infer that the features of the Jewish law were the ordinary ones of a progress from an unlimited enjoyment of fruits by the pledgee to the final duty to restore the excess over a fair gain.⁴

corded was that the creditor took from the debtor the whole of the hypothecated *res* on default, and therefore (since, as we shall see, he could follow a hypothec into a purchaser's hands) from a purchaser also. The questions that were now discussed were: (1) whether he could take improvements also, or must pay for them; (2) whether growing crops were improvements; (3) whether the buyer could demand a piece of land, instead of money, for the improvements. The better opinion was that he could take the improvements also without paying for them; though an apparently later distinction, made by some, would allow him to do this only where the debt was greater in value than the *res* alone. But that the buyer could pay off the creditor and keep the land was never agreed to: "the buyer cannot keep the field against the creditor's will, for the creditor takes it as his hypothec"; though the contrary view was occasionally advanced (apparently however for land taken on execution only, and not for a genuine document-hypothec). Moreover, in all cases, apart from the question of paying for improvements, the relative value of the debt and of the *res* was treated as immaterial. It was even discussed (R., I, 265, Khetouboth, 92) whether the creditor who went to seize the *res* in the hands of the purchaser could be forced to accept instead the payment of his claim by the debtor.

The custom of marking out the limits of a land-hypothec beforehand (R., III, 64, Baba Metzia, 14) was apparently due to the principle that the creditor obtained not merely a lien for a certain value but a right to a specific *res*.

¹ See the citations of the preceding note. But this, as in Germanic law, was not true of movables (R., II, 32, 51, Baba Kama, 12, 33; R., IV, 145, Baba Bathra, 44).

² R., II, 164, Baba Kama, 36.

³ R., III, 280, Baba Metzia, 65.

⁴ The Jewish laws of usury have been the subject of as much difference of interpretation as the command of Jesus of Nazareth, "*Δανείετε μηδὲν ἀνελπίστους.*" It is enough to say that the original prohibition of gain by mere lending was in the Pentateuch

3. JAPANESE LAW.¹

I. Etymology gives us no assistance, — except that the generic word for pledge, *shichi*, is also used to-day, like *pfand*, to mean a forfeit in a game. But the two leading features of the forfeit-idea —

limited to the profits from money, while only under the rabbis was this extended to the profits of commerce and of industry (R., III, xxv). The Jews were originally (contrary to the popular opinion) in no sense a commercial or money-lending people; they were a purely agricultural and pastoral people; so that their emphatic opposition to the gains of the money-lender, like that of the pastoral Arabs (in Mohammedan law) is easily understood. There were, however, recognized ways for the pledgee to evade the strict rule and obtain a profit on his lending. In the first place, the Mosaic prohibition would merely exclude the taking of interest as on the money loaned, and hence covered only *ribith ketsoutah* (specified interest), i. e. an express agreement to pay an interest by means of the *res*-profits. Thus, if nothing was said about interest, but the pledgee as possessor took the profits of the land, it was only *abak ribith* (imprint-on-the-dust of usury), in other words, *de facto* interest only; and as this was merely disapproved by the rabbis, not forbidden by Moses, it could be done; much as Glanvil condemns the usurious mortgage, but admits that it is not prohibited in the King's Court. Nevertheless, this absolute enjoyment of the profits was not without its opponents in the Ghemara. One view was that a fixed sum yearly out of the profits should be set off against the principal, so that after a term of years the land redeemed itself. Another plan was to allow a five years' use without accounting, and thereafter to reckon the whole annual profits against the principal. By either of these two plans, the pledgor could not redeem within the period; but where no accounting at all was required, he could redeem at any time. Still another opinion was for a complete accounting of the annual profits from the beginning until the principal was paid (R., III, 284, Baba Metzia, 67).

Thus these various expedients do not differ in their essence from those we have observed in Germanic law. They assume no different theory of pledge, and they illustrate merely the effort to compel the pledgee to restore an excess of profits.

¹ Politically (though not socially nor artistically) Japan lingered a century or two behind feudal Europe in development; and the state of legal ideas at the Restoration of 1868 was not dissimilar to that of Northern France under Louis XIV., or of Germany in the time of Frederick the Great. A multitudinous variety in local usages still prevailed, and the centralized justice of the Shogunate had only a limited influence towards uniformity. The leading features of the customary law at that time have been recorded, though not with the detail that could be wished; but this very variety has preserved the various stages of development of the pledge-idea, though it leaves the order of development to inference only. The legal documents and judicial precedents, however, give us some evidence on this point, and justify more certain conclusions. Here, however, as in other systems, some features are fully represented in the sources, while upon others the data are meagre.

The references following are to the Supplement to Volume XX of the Transactions of the Asiatic Society of Japan: "Materials for the Study of Private Law in Old Japan," Parts II and III, "Contract: Civil Customs" and "Legal Precedents, Loans," and Part V, "Property: Civil Customs," edited by the present writer; the citations are by Part and page, with the name of the province of which the custom is recorded. The manuscript translation of Part VI, "Property: Legal Precedents," and Part III, Section III, "Contract: Legal Precedents: Pledge," not yet published, is referred to as MS.;

the pledgor not liable for a deficit, and the pledgee not bound to restore the surplus — are clearly seen, and the stages of progress are distinguishable.

1. In the translated records there seem to be only three instances of the former rule; but they justify the conclusion that it originally prevailed generally; ¹ and there are evidences that, in some places at least, it had been departed from by express clause.²

2. The presence and the persistence of the latter principle appears on almost every page of the records.³ In later times we hear of the use of a clause providing that the pledgee shall restore the surplus; ⁴ and in the hypothec (as we shall see) this principle had become a fairly regular rule of law.

3. The use of the *auflassung* to assist the creditor is shown with great fulness in the records, and offers an unmistakable and remarkable similarity to the Germanic law. We do not know enough about the history of property-law in Japan to be able to analyze the elements of a transfer-transaction, and the universal employment of written documents for the purpose has tended to obscure the original elements. But we do know that for a perpetual and absolute sale of land a quitclaim-clause, similar in phrase and in pur-

unfortunately no closer indication than chapter and section can here be given; for a list of the chapters and their titles, see p. 13 of the Introduction, Part I, to the "Materials." There are also references to Simmons, Notes on Land Tenure, etc., edited and annotated by the present writer, in Trans. As. Soc. Jap., XVIII, 37.

¹ II, 113, Echu: "If the article pledged is lost or destroyed by flood, fire, theft, or other unforeseen event, the pledgee is not liable to make compensation, nor the debtor to pay the debt"; III, Sect. III, c. V, § 2, MS., Regulations, undated, for the pawnbrokers' guild; in case of fire or robbery, it is to be the "loss of both" (*ryo-son*); but of destruction by rats or insects, the pledgor's loss (i. e. as we saw for the same phrase in the Sachsenspiegel, the pledgor is told that he cannot hold the pledgee to his absolute liability, but it is assumed as clear that the pledgee has no claim on the pledgor); VI, c. IV, § 3, MS., a regulation of the early 1700's, that on the flight of a bankrupt or criminal pledgor, the *res* was sold by the authorities, and the loss, if there was a deficit, was the pledgee's.

² We find agreement-clauses (II, 102, Echizen; 113, Suwo) limiting the pledgee's liability for "calamity of Heaven" (*ten-sai*), and we may infer that a corresponding change in the pledgor's liability was also thus effected.

³ II, 91 ff. The frequent phrase for realty is: "On default, the property is forfeited," without any mention of restoration of the surplus. We find, in 1744, a Shogunate ruling (VI, c. IV, § 2, MS.) even going so far as to return a part-payment, where a final default had occurred, and to let the pledgee take the land in forfeiture. For personalty, the rule seems to have persisted till very late: II, 112, Kai; 113, Echu, Idzumo, Suwo (these last three are of the most old-fashioned provinces); III, Sect. III, c. V, § 2, MS., regulation of the pawnbrokers' guild.

⁴ VI, c. IV, § 3, MS., clause providing for return of *mashi-kin* (surplus), date uncertain; another similar document, dated 1827.

pose to that of the Germanic law, was common, and was perhaps essential to convey complete title.¹ Moreover, the primitive stage of the law, for a pledge, was that it was indefinitely redeemable.² The pledgee, of course, strove to obtain the cutting off of this right; and accordingly we find the next stage represented by the rule³ (obtaining probably in the majority of provinces) that, when ten years had elapsed after default, redemption was cut off. That this result primitively involved some such process as the German *aufbietung* or offering-about, already described, is almost certain from the occasional mention of this process as surviving,⁴ and that the process involved the idea of curing a defect of title appears from the fact that a final entry is usually mentioned as being made in the title-register.⁵ Meanwhile, however, the pledgee had found out that by means of an *auflassung* in advance the cut-off could be accomplished without legal proceedings. The pledgor's clause explicitly appears as a quitclaim.⁶ A discussion arose in the Shogunate courts, in the 1700's, which neatly brings out the nature of the process as that of curing a defect of title; the dispute was whether it was enough to put such a clause in the deed of pledge, or whether a special document of release must be additionally given by the pledgor.⁷

¹ Thus, for a sale in perpetuity (II, 43, Iwami): "Neither I nor my descendants may hereafter raise objection to this transfer"; so also II, 98 Hida; a typical document of the same sort is also given in VI, c. II, § 2, MS.

² Such a custom survived in many places: II, 93, Ise ("there is no permanent forfeiture"); 100, Iwashiro; 101, Uzen; 107, Awa ("an old custom permits redemption at any time within several tens of years").

³ II, 92, Settsu: "The usual term is one year; but the instrument remains valid for ten years; if at the end of that time the debt remains unpaid, the property becomes the creditor's forever"; so also 95, Totomi; 96, Kai; 98, 100, Shinano; 105, Harima; 109, Chikugo. The ten-year limit is laid down by the Shogunate in a regulation of 1779 (VI, c. II, § 2, MS.); but it also appears as early as 1721 (Simmons, 214, Appendix).

⁴ II, 109, Buzen, where the pledgor is twice summoned, and then the final entry of transfer is made on the register; compare also the frequent custom (II, c. III, pp. 13 ff.) of offering about to the villagers, in case of an intended sale, to cut off their preferential right to purchase.

⁵ E. g., II, 108, Iyo.

⁶ VI, c. IV, § 2, MS.: "I shall never make any claim to the contrary"; ib. § 3: "The land shall be delivered to you on default, and I shall make no objection." This is the regular phrase.

⁷ The common form of the pledge-document contained no forfeiture [*nagare*]-clause (see e. g. II, 99); and in 1729 we find the following question submitted to the Shogunate judges (VI, c. IV, § 2, MS.): "It is the custom in Totomi provinces for the pledge-document to contain the area of the land, the amount borrowed, the term of repayment, and clauses that the land will be returned if the money is then paid, and if it is not paid, the land will be absolutely forfeited; and when the default occurs and forfeiture is to ensue,

This force to the forfeiture-clause was given as late as 1783 in the Shogunate courts.¹ But in a discussion towards the end of the century² the injustice was noted of forfeiting land excessively greater in value than the debt, though the document was still regarded as controlling; while by the early 1800's we find it settled that, on the bankruptcy of a debtor, a pledge must be sold and the surplus handed over to the second creditor.³ The modern point of view had probably been reached by the Shogunate courts in this century, though we have no record of it, and though the local customs still show the old idea continuing in full force at the Restoration. But in the hypothec, to which we now turn, the result had long been reached.

II. The hypothec amply appears to have been originally of a piece with the pledge.⁴ Moreover, the notion seems to have been precisely that of a contingent pledge.⁵ The form was: "If I default in payment, the land shall be transferred to you as pledge,"⁶

a special deed of forfeiture [or release] must be given to the creditor by the pledgor. If now a pledgor demands the privilege of redeeming land long before forfeited, but for which a release-deed has never been given, what should be the decision?" Answer: "The land is not to be treated as the absolute property of the creditor, and may be redeemed; because, if no release-deed has been given, it is not an absolute forfeiture, in spite of the clause that the land should be forfeited and in spite of the lapse of time." But in 1733 (ib.) we find the Supreme Court refusing to allow a redemption after default where the *nagare*-clause exists in the original deed of pledge; and in a later document (ib.) we find a clause that the pledgee should own forever on default treated as sufficient to cut off redemption. Where neither clause nor release-deed existed, the legal ten-year limit would apply (ib.).

¹ VI, c. IV, § 2, MS.

² VI, c. IV, § 3, MS.

³ Ib., for Osaka, by 1790; III, 75, 209, for elsewhere, a little later.

⁴ In the first place, the word was originally the same, i. e. *kaki-ire-shichi* (II, 91, 93); in the next place, the term *shichi* alone was used in several old-fashioned provinces, even where the pledgor retained possession: II, 102, Wakasa; 104, Sado, Idzumo, Hoki; 107, Sanuki; 109, Hizen; 110, Higo; 92, Settsu.

⁵ In the term *kaki-ire* (often used for short, instead of *kaki-ire-shichi*), *ire* is "put," "place"; the *ire* being the generic verb, as in *shichi-ire*; German *setzen*, Greek *τίθημι*, Latin *ponere*. The *kaki* is now written with the ideograph for "write," and on its face would mean the written document or register-entry. But a document or entry was equally customary for the ordinary *shichi* (II, 2 ff.); and there would be no reason whatever for distinguishing the former as "written." Now *kaki* also means (in another ideograph) "hang," "suspend"; and as the common people go much more by the spoken word and the syllabary than by the ideograph (which is like our Latin-derived word), it is perfectly possible for the original word to have become mis-written. Moreover, in Yamato, the oldest and most classic province, we find the customary term (II, 91) to be *kari-kakitsuke-kaye*, meaning exactly "provisional" or "contingent alteration of the register."

⁶ VI, c. IV, § 3, MS.

or, "If I fail to pay at the appointed time, the property is to be yours, and is to be transferred to your name on the register";¹ the latter employing the later forfeiture-clause.² It is clear that the original usage, as seen surviving in a few places,³ was to forfeit absolutely on default, without regard to surplus. But a later stage is the more common one recorded, in which the property on default is sold and the creditor paid out of the proceeds.⁴ The records of customs do not throw much light on the corresponding development of the pledgor's duty to pay the deficit; but the single express mention of the subject⁵ reveals the pledgee's duty to restore the surplus already reached while the pledgor's deficit-liability is still unrecognized, — as in Germanic law. In the judicial precedents of the Shogunate the same stages of development are represented.⁶ It thus appears that, both in the Shogunate judicial rules and in the local customs, the idea of collateral security had developed much faster for the hypothec than for the pledge;⁷ and the extent of this recognition may be judged from

¹ VI, c. IV, § 1, MS.

² Here, too, as in the ordinary pledge, appears the same necessity for curing the defect of title by special quitclaim clause or deed; thus (II, 111, Higo): "It is a regular stipulation in instruments of hypothec that the debtor shall make no objection if on default at the end of the term the creditor assumes possession of the property"; (II, 103, Echigo): "In case of default the land becomes forfeit, and an instrument of forfeiture is delivered to the creditor by the debtor, the former thus obtaining complete and perfect ownership of the land"; so also II, 93, Owari. The legal cut-off, after a certain period, is also found: II, 106.

³ II, 100, Shimotsuke; 101, Rikuzen; 103, Echigo; 106, Aki; 111, Satsuma.

⁴ II, 93, Ise; 100, Iwaki, Iwashiro; 102, Echizen, Echu; 104, Tango (where it is said that either forfeiture or sale takes place according to agreement, i. e. an intervening stage of development); 106, Suwo; 107, Kii; 108, Iyo.

⁵ II, 107, Kii.

⁶ As late as 1729, in house hypothec at least (VI, c. IV, § 1, MS.), the *res* was forfeited on default, and no account rendered; but in subsequent regulations (ib., § 3) there is to be no forfeiture in the hypothec. The theory of the transaction is well shown by a lengthy controversy over the question whether the hypothec-*res* of an absconding bankrupt (a criminal) could be confiscated to the State as the defaulter's property, or whether the pledgee could claim it as forfeited; in 1751, and later, it is confiscated, on the former theory (ib., § 1), sold, and the government-fine and taxes paid out of the proceeds, the pledgee getting his claim out of the remainder so far as sufficient (ib., dated 1840); though the special custom of Osaka was there allowed to prevail, by which the *res* was handed over to the pledgee on the theory that it was his, not the pledgor's (ib., § 1, as late as 1837).

⁷ It is for this reason that we find much said in the precedents about the pledge with re-release (VI, c. IV, § 1, 2, MS.). When pledgees found that the forfeit-idea was disappearing, to their disadvantage, in the *kakire-shichi*, they began to attain their purpose by taking an ordinary *shichi* and then giving a lease (*kosaku*) back, leaving the pledgor in possession; this was sanctioned. Then they merely put a lease-clause in the origi-

the circumstance that in some provinces the hypothec was the only form used.¹

The significant rule that there could not be a second hypothec on the same *res* seems to have been everywhere in force.²

III. Sale for re-purchase.³ The primitive and peculiar function of this transaction, as already explained for Germanic law, seems to have been the preservation of the chance to regain family-property sold in time of need to those who were not disposed to exact harsh terms of forfeiture. The evidence for this view is to be found rather in the traits of the community than in the documents, and one can only refer to the general flavor of the customs for the source of the impression.⁴ Ordinary lenders, however, would not here resort much to the sale for re-purchase for the purpose of securing an immediate cut-off on default, for the simple reason that they could still usually attain that end, in the stage in which the law comes to us, by the forfeiture-clause in a genuine pledge.⁵

nal pledge-deed; this was at first treated as void, and the transaction as *kakiire*; but later (perhaps till 1840) it was allowed as valid and effective to prevent the *res* from being treated as *kakiire*.

¹ II, 94, Mikawa; 93, Ise; 97, Omi; 100, Iwaki; 102, Oshima; 111, Iki, Hyuga. Moreover, as in Germanic history, the hypothec alone is found, in some districts, in towns: II, 108, and elsewhere.

² II, 4, Omi, Iwashiro, Rikuchu; 6, Echigo, Kii, Iyo; 7, Tsushima; 103, Echigo; 109, Bugo; VI, c. IV, § 3, MS.; Simmons, 192, Kyoto. The hypothec by deposit of title-deeds was not uncommon: II, 3, 95, and elsewhere.

³ The terms were: *Nenki-uri* (term-of-years sale); *kane-ari nenki uriwa* (sale with return if I have money within the term); *ariai-uri* (happen-to-have-[money] sale); *hommono-kayeshi* (original-*res* return).

⁴ II, c. I, II, VI, VIII. One passage (II, 20) mentions, as a peculiar variety of sale, the "sale of patrimony" (*mei-seki-uri*), "usually made by a seller who wishes to procure a further advance." One strong piece of evidence, however, is the fact that there was allowed (as in Scandinavia) an unlimited period for thus buying back, at an era when the above-described limit of ten years was in full force for cutting off the redemption of a genuine pledge: II, 5, Echizen; 18, Ise ("no matter how many years pass by"); 30, Uzen ("perpetual privilege"); 109, Buzen; 20, Mikawa ("even though many tens of years elapse before he claims it"; yet custom fixes 61 years as the limit); 107, Awa ("several tens of years").

⁵ They did, however, employ it for that purpose in certain regions; for in the hypothec, as above pointed out, the lender must (in this century certainly) restore the surplus, while in the pledge with possession he usually need not; thus the lender would avoid the hypothec, and take a sale on a short term of re-purchase, in a region where the hypothec had become the only form of pledge; and so in many regions we find it recorded that "pledge goes by the name of 'sale for a term of years'": (II, 109, Buzen, Hizen, Bugo; 111, Iki; 102, Echizen, Kaga; 103, Echigo; 104, Hoki; 107, Kii, Awa; in some places, it is interesting to note, the resale-agreement was in a

IV. The pledgee appears originally as taking all the profits of the land in his possession without accounting; while the hypothec appears as accompanied by ordinary money-interest only.¹ About 1736 the Shogunate officials seem to have required an accounting for the surplus over the legal rate of 15%, leaving the deficit to be at the pledgee's risk;² but the customs above cited indicate that this rule was but little enforced. It is enough to note, however, that the transaction is always a type of *shichi*, and not a transfer of the use of the land or any other different institution; we are merely dealing, as in Germanic law, with one of the features of the law's attempts to prevent undue profits by the pledgee;³ and the coincidence of the late persistence of his non-responsibility alike for surplus capital and for surplus fruits indicates the connection of the two matters.

4. CHALDEAN LAW.⁴

We know that the Chaldean civilization was a mercantile one, and that commerce was highly developed; and yet all this is con-

separate document, as in Lombardy: II, 103, Echigo; 104, Hoki). It does not appear that the law had reached the stage in which this evasion was struck at by the authorities.

There was also a contrary mode of evasion, i. e. a resort to the pledge-form for the purpose of evading the prohibition of perpetual alienation which for economic reasons was attempted by some of the feudal lords; it was the very forfeiture-feature of the pledge which enabled the buyer to attain his purpose equally well by a short-term pledge: II, 25, 26, 27, 28, 30, 33, 39, 40, 42, 110. So in France, we shall see the pledge used to evade the feudal fee due from every sale. Both these cases it is well to note, for they warn us to search for the reasons for a certain form, and they show how a form undesirable for one purpose may under certain conditions become desirable for another purpose.

¹ II, 92, 95, 96, 97, 98, 104, 105, 106, 107, 108, 110, 111. Thus, in Iwami (105): "The creditor [in pledges] takes possession of the land and obtains a profit by cultivating it himself, so that no interest is paid; at the end of the term the debtor may redeem by paying the principal. In hypothecs, the ownership remains in the debtor, so that the interest is to be paid in money, and on redemption both principal and interest are paid."

² VI, c. IV, § 2, MS.; for the legal rate, see III, 298.

³ Yet in other ways the attainment of undue profits was struck at; thus, by 1779, the practice of leasing back one half the land to the pledgor while having him bear the whole of the taxes (known as *zan-chi*), and of leasing back all the land and having him pay part or all of the taxes (known as *hanrai-no*), were forbidden (VI, c. II, § 2, MS.); and these are mentioned as forbidden in the customs of the Restoration (II, 99).

⁴ Different features of development are represented with different fulness in different systems of law. In the Chaldean system we find only a few points represented in the sources hitherto accessible, and these are such as befit primitive stages of the law. The sources are here exclusively documents (as we should call them), and only

sistent with a relatively primitive set of ideas. A few marks of these may be observed. The generic term, in the first place, for pledge and hypothec, was the same, — *maskanu*.¹ Furthermore, the *res* is always said to be “in place of” (*kuum*) the thing owed.² The form of the hypothec³ is that of a suspended pledge: “If the

by comparison of these can a few generalizations be reached. References are as follows:—

1877, Documents juridiques de l'Assyrie et de la Chaldée, Oppert et Menant (“Chaldea” will here be used as including Chaldea-Babylon, and the later Assyria-Nineveh); 1893, Beiträge zum babylonischen Privatrecht, Meissner; 1896, Sammlung v. Ass. u. Bab. Texte, B. IV, Texte jurist. u. gesch. Inhalts, Peiser; 1886, Les Obligations en droit égyptien, Eugène Révillout; Appendix (paged continuously), Le droit de la Chaldée, Victor Révillout. The last work is the most useful, because it contains the greater part of the pertinent documents. The reference here will be to “R.,” followed by the page, and by the number of the original document (as cited by M. Victor Révillout), from M. Strassmeyer's edition (untranslated) of the British Museum collection; where no number is added, the document is usually an unpublished one of the Louvre. The comments of the learned brothers Révillout are unfortunately here of no service, as they have not studied the documents from the present point of view. Moreover, their work is of very different value; for the first above mentioned neglects usually to cite the source of the original text, and gives most of his space to adulation of the Egyptian law and speculation as to its influence upon the Greek and Roman law. The work of Oppert and Menant is to some extent untrustworthy; e. g. it translates *hubulli* as *pignus*, while the word certainly means only “interest.” Meissner has only a few pledge-documents. There are other translated collections, but they seem to have nothing useful.

Nothing will here be attempted for the law of Egypt; for, in spite of the greater abundance of general material for the student of institutions, the published pledge-documents are as yet few.

¹ See the documents in Révillout, *infra*; Peiser, 176, 184, 202, 218, 223. Oppert and Menant, in a Chaldean phrase-book, wrongly translate *hubulli* as *pignus* (20, 22); their *manzazanu* (14, 22) is evidently an erroneous decipherment of *maskanu*; another word, *buh*i (35, 138), probably means “loan,” and their rendering seems unsafe.

² As almost every document in Révillout shows.

³ The phrase *ina pani* (“à sa face”) seems to indicate possession, and when said of the creditor, his possession, i. e. a pledge proper: R. 429, No. 176; 452; 366, No. 75; 435, No. 26 (“until the creditor receives the money, . . . the house shall be *ina pani*”); 436, No. 156; 452; 508, No. 36; 509, No. 135. For the hypothec, *insatgil* or *tusaggil*, “confide,” sometimes occurs with *kuum*: R. 345, No. 154; 347, No. 55. That *kuum* was equally used for hypothec and pledge proper appears from its use with, e. g. the hypothec for a wife's *dos*: R. 345, No. 154. — The distinctive mark of the pledge proper seems to be the clause: “There is no rent for the house, and no interest on the money,” which assumes the pledgor to be using the money and the pledgee to be using the house; it occurs as follows: R. 435, No. 26; 440, No. 114; 454, No. 16; 504, No. 26; 507, No. 59; 509, No. 135; 510, No. 68; 514, No. 114; Peiser, 203, 223. On the other hand, the hypothec is characterized by a clause forbidding a second hypothec: “No other possessor shall put his hand on the *res* till the creditor receives his money.” This phrase cannot apply to the pledgee's possession (i. e. forbidding him to alienate), because, as we shall see, the pledgee could transfer

money is not paid at . . . then the house which the debtor lives in shall be the pledge of the creditor till payment"; or, "if, etc., then the slaves are to be delivered to the creditor in full payment, in place of (*kuum*) 50 mina of silver."¹ Again, the general hypothec ("all that he possesses, both in town and country"), which was in frequent use,² the generic phrase being the same, seems to have been commonest for purely contingent claims.³ The characteristic prohibition of a second hypothec also appears;⁴ and the peculiar expedient thus required in obtaining a second loan (to be noted later in Greece) is in common use.⁵ We have practically no evidence as to the risk of deterioration and the duty to restore a surplus; but it is difficult to believe that there was any duty of either sort.⁶ Moreover, though the ordinary deed of sale or exchange regularly contained a quitclaim or *auflassung* clause,⁷ it seems totally lacking in the pledge, — strongly indicating, since the tool (as used in other communities) for cutting off the redemption-right and surplus-duty was at hand and known to them, that their failure to use it must have been because the rules of pledge did not

freely. It may be asserted to be the distinctive earmark of the hypothec, and is found as follows: R. 524, No. 158; 430, No. 90; 445, No. 2; 454, No. 16; 455; 521, No. 90; 528; 519, No. 118; 519. In four documents it also occurs with the above described "rent-interest" clause; but in two of these (R. 512, No. 22; 514, No. 167) it is clear that one *res* was given in pledge, and the other in hypothec (or a general hypothec) for the rest of the debt or additional security, so that both the clauses would appear in the document; in the third document (508, No. 36) a gap exists, which probably contained a general hypothec; in the fourth (527), no explanation of the discrepancy suggests itself. In Peiser, 218, the clause occurs (as often above) in a general hypothec.

¹ R. 524, No. 158; 528.

² Examples in R. 430, No. 90; 436, No. 156; 445, No. 2; 450, No. 95; 454, No. 16; 521, No. 90; 519, No. 118; Meissner, 9; Peiser, 218.

³ M. Révillout speaks of it as often used for sureties and joint obligors (521); and his documents show it in use for the wife's *dos*, e. g. 345, No. 154.

⁴ Note 3, p. 413, *supra*.

⁵ Thus (R. 439, No. 114), one who has given a house in pledge for 3 minas has a new lender advance him another mina on the same house; but in order to accomplish it, the second lender gives the pledgor the amount of both loans; the latter pays off the first lender, who then transfers the house to the second lender; so also R. 366, No. 75. That credits and pledges were freely transferable, see R. 45.

⁶ E. g. one document for a debt of 34 *cor* of dates and 13 shekels of silver pledges a slave, to be on default the "entire equivalent" of these sums; and in all the documents of Révillout there is no mention of restoring a surplus or exacting a deficit. In Peiser, 218, a clause provides that the crop is to be sold, and the debt paid out of them; but this is a solitary instance, and the original text may not mean quite as much.

⁷ R. 11; 423, No. 170. There was not a literal quitclaim; the seller promised *if* he reclaimed to pay ten times the price; and the purpose was to bar his claim.

yet force a resort to it. Nor was there, apparently, any accounting for the profits.

5. SLAVIC LAW.¹

From etymology and the use of the pledge-terms we get nothing. It is clear, however, that the forfeit-idea prevailed, in the late mediæval law, as against the pledgee,—i. e. if the *res* perished, he recovered nothing from the pledgor;² and the transition-stage of an agreement to the contrary is represented.³ The pledgee's duty to restore the surplus has been reached⁴ (here, as in Germanic law, preceding the pledgor's deficit-liability), though the stage of absolute forfeiture had clearly preceded.⁵ There was originally an unlimited right of redemption, even after a default and an ensuing sale by the pledgee to a third person;⁶ but by agreement this right could be cut off.⁷ Collaterally with this, however (as in Germanic law) seems to have existed a legal proceeding for the cut-off; for in the Baltic provinces the pledgee sells after judicial permission;⁸ and by means of this machinery, at a later time, the clause of forfeiture (and also the evasion by sale-for-repurchase) is struck at,⁹ but the data are too confused to suggest anything definite. The pledgee appears in the beginning as not accounting for the fruits of reality;¹⁰ whether the later stage was reached does not appear.

6. MOHAMMEDAN LAW.¹¹

The risk was on the pledgee, in the Hanefite system, but in that later stage in which its loss leaves the pledgee remediless up to the

¹ The wealth of the sources, in comparison with the available data, is enormous; for besides the Southern non-Russian Slavs, and the as yet purely customary law of many Russian tribes, there are four distinct groups of law in which early custom and modern legislation may be traced in a continuous stream,—Russia proper, Poland, the Baltic provinces (Lithuania, etc.), and Finland.

References: 1835, Maciejowski, *Slavische Rechtsgeschichte*, tr. by Buss, 1st ed.; 1877, Lehr, *Éléments du droit civil russe*.

² M., § 272; Lehr, 336, 345, 382; if a pledged animal died, the pledgor need pay only one half, and the pledgee exonerated himself by returning the skin: L., 329.

³ L., 336, 382.

⁴ Ib.

⁵ M., § 272.

⁶ Ib.

⁷ Ib.

⁸ L., 382.

⁹ L., 330, 382; M., § 272.

¹⁰ L., 382.

¹¹ The same paucity of translated sources here hampers us, though there are four great bodies of Mohammedan customs still in force,—the Hanefite in Turkey, the Malekite in North Africa, the Shafite in the East Indies, and the Imamite in Persia and Northern India,—each with its Coke upon Littleton and many lesser commentators. The first three are sects of Sunnite, the last of the Shiite branches, which divide the followers of Mohammed.

References: 1875, Baillie, *Digest of Moohummedan Law*, Part I (Futawa Alum-

value of the *res* only;¹ while in the other three systems the loss of the *res* leaves the debt still existing.² There is no direct evidence as to a duty of surplus-restoration; but the pledgee's title did not become absolute *per se* on default, and we find that a judicial order was necessary to make a sale by him valid,³ and also that the forfeiture-clause and the sale-for-repurchase (*bye-al-wufa*) was well known as an expedient for evading this necessity;⁴ so that we can scarcely doubt that it was used to evade the surplus-restoration, at least in those systems in which the pledgor was liable for a deficit, and especially as we do there hear of a prohibition of the forfeiture-clause.⁵ The hypothec was employed, the same generic term being used;⁶ and a second hypothec was unlawful.⁷ The matter of the pledgee's accounting for profits is confused by the strict prohibition (similar to that in Jewish law) of interest of any kind; and no clear indications appear.⁸

7. HINDU LAW.⁹

A few significant features are ascertainable. (1) There are many passages in the Sutras discussing the loss of the *res* as affecting

geeree); 1885, Kohler, Zeitsch. f. vergl. Rechtsw., VI, 208, Islamitische Obligationen- und Pfandrecht; 1860, Tornaauw, Le Droit Musulman; 1886, Nauphal, Cours du Droit Musulman, Part I; 1882, Van den Berg, Minhâdj At-Tâlibîn.

¹ Kohler, 222; but Baillie (807) and Tornaauw (172) speak of the risk as unqualified.

² Van den Berg, I, 431; Kohler, 222.

³ Kohler, 226; Tornaauw, 172; Van den Berg, I, 431; they do not agree in the precise mode of stating this.

⁴ Baillie, 807; Kohler, 227; Tornaauw, 172.

⁵ Van den Berg, I, 431.

⁶ Tornaauw, 129. Kohler, 227, thinks it does not exist; but Tornaauw particularly repudiates this fallacy. The form of a lease back to the pledgor was also known: Tornaauw, 170; Van den Berg, I, 431.

⁷ Van den Berg, ib.; Kohler, 227; Tornaauw, 175, *semble*.

⁸ See Kohler, 225.

⁹ The Hindu sources are chiefly one Sutra (Vishnu) or book of the law, and five Sas-tras, or commentaries on Sutras; the references are to the following editions: Vishnu, Jolly, in Sacred Books of the East, vol. VII; Gautama, Bühler, ib., vol. II; Manu, Bühler, ib., vol. XXV; Narada, Jolly, ib., vol. XXIII; Brihaspati, id., ib.; Yajnavalkya, Roer and Montrion, 1859; the first two represent 100-300 A.D., the others 500-600 A.D. There are also a few translated commentaries (usually mere collections of earlier passages from the above different schools) of early modern times: 1863, Vivada Chintan-rani, tr. by Vachaspati Misra (1420 *circa*); 1865, Vyvahara Mayukha, tr. by Nilakamtha Bhata (1400-1600). The drawbacks in this field are: (1) the sources are almost exclusively brief passages from the primitive books, with no comments or documents; (2) the translators seldom furnish the technical words of the vernacular, so that no testing of their work or independent judgment is possible; (3) the curt and obscure terms of the vernacular often make the translation a mere choice of hypotheses, and

the pledgee's right to claim the debt;¹ and though no one passage distinctly exhibits the primitive rule,² they all evidently represent a state of opinion which is just getting away from it and feeling the necessity of disposing of it. (2) A second hypothec is not permitted.³ (3) The pledge with creditor's use is open to unlimited redemption; but the deposit-pledge is forfeited when the accrued and unpaid interest equals the principal, or when at maturity of the term, if there is one, a default occurs;⁴ and there is a proceeding for forfeiture, like the Germanic one, consisting of a summons to the pledgor,⁵ while in the same text the very next section but one, evidently interpolated,⁶ provides in such a case for a sale or appraisal and the handing over of the surplus to the pledgor. (4) The pledgee, in some Sutras, does not account for profits except by express agreement,⁷ while in another the profits *per se*, when they have paid off double the principal, redeem the *res*.⁸

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(To be continued.)

the modern scholars, not looking at it from the legal point of view, may choose an inferior hypothesis; thus, in Manu, VIII, 145, the statement that a pledge cannot be forfeited by lapse of time should probably read, as a collation of passages shows, "a pledge cannot be acquired in ownership by adverse possession," — a principle often enunciated in other systems; and numerous other examples may be cited.

¹ Gautama, XII, 42; Vishnu, VI, 6; Narada, I, 126; Brihaspati, XI, 19, 20, 21; Yajñavalkya, II, 59. Moreover, the rule which indicates the first step towards a deficit-liability of the pledgor — that if the *res* perishes or deteriorates he must replace it — is to be found: Narada, I, 130; Vyavahara, c. V. s. 2, 1; Yajñavalkya, II, 60.

² Singularly enough, one mediæval commentary expressly says: "If pledged cows, etc. be accidentally destroyed, the principal shall be lost; this is according to the practice among persons of good manners": Vivada, c. I.

³ Vishnu, V, 181; Vyavahara, c. V, s. 1, 1: "As long as I fail to clear off thy debt, so long will I not alienate either in gift, sale, pledge, or any other mode, this house, field, or other thing."

⁴ Yajñavalkya, II, 58; Brihaspati, XI, 25-27.

⁵ Brihaspati, ib.

⁶ As the editor suggests.

⁷ Vishnu, VI, 8; Brihaspati, XI, 23, 24.

⁸ Yajñavalkya, II, 64; so for movables: Vishnu, VI, 7.

Hindu law of the classical period (before 600 A.D.) is of course to be distinguished from the modern customs of the living Indian peoples, largely non-Aryan. Their customs, however, contain much valuable evidence; for instance, in no community are two features of the primitive pledge, indefinite right of redemption and pledgor's non-responsibility for the original debt, better shown (Tupper, Punjab Customary Law, III, 217).